IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-504

SAL MARRA,

Petitioner

v.

STATE OF WEST VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The Supreme Court of Appeals of West Virginia

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INDEX

Cases Cited

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PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Appeals of West Virginia

Petitioner, Sal Marra, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this case on June 27, 1978.

OPINION BELOW

There was no opinion rendered by the Supreme Court of Appeals of West Virginia in that the Court denied the petition for writ of error and supersedeas by Order entered on June 27, 1978, a copy of which is appended at App. A, p. 1.

JURISDICTION

The judgment Order of the Supreme Court of Appeals of West Virginia was entered on June 27, 1978,

and this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether a defendant in a state court criminal trial is denied rights afforded by the Sixth and Fourteenth Amendment when the trial jurors are aware that the defendant had been found guilty in a prior trial.

2. Whether the decision below denied petitioner an appeal as a matter of right and thus denied equal protection via the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth and Fourteenth Amendments; W. Va. Code, Ch. 58, Art. 5, Sections 1, 3, 4 and 10.

STATEMENT OF THE CASE

Petitioner was indicted at the September, 1976, term of the Circuit Court of Hancock County, West Virginia for sale and delivery of two pounds of marijuana, a Schedule I controlled substance. Petitioner was tried on the indictment in June, 1977, and found guilty. Petitioner's motion for a new trial was granted in August, 1977, and thereafter filed, *inter alia*, a motion for a change of venue alleging that he could not receive a fair and impartial trial in Hancock County, West Virginia, and an evidentiary hearing was conducted in August and September, 1977.

The motion for change of venue was predicated upon the fact that during the early 1970's petitioner, together with five other police officers of the City of Weirton, West Virginia, police department had been involved in a series of breaking and enterings during the night-time of various retail storerooms throughout the City of Weirton, in Hancock and Brooke Counties, West Virginia. These "Police Scandal" cases literally shocked the community and caused the people of the City of Weirton to lose confidence in its police department. Emotions and antagonism towards the police officers ran very high. There was a public outcry that said police officers be sent to the penitentiary. One of the police officers, namely Thomas Latinsky, was actually wounded by bullets when he emerged from a jewelry store with petitioner on the night that the "Police Scandal" cases broke. The then Prosecuting Attorney of Hancock County, West Virginia, Edward A. Zagula, arranged for petitioner to receive complete and total immunity in exchange for his testimony against the indicted police officers. The Honorable James G. McClure, Judge of the Circuit Court of Hancock County, granted the police officers separate trials and separate changes of venue thereby requiring numerous trials throughout various parts of the State. Petitioner was the key witness in each and every trial. These trials and petitioner's testimony received enormous and widespread publicity, especially in the newspapers, and particularly the *Weirton Daily Times*, the *Steubenville Herald Star* and the *Wheeling Intelligencer*, three newspapers of general circulation throughout Hancock County, West Virginia. Further, there were daily radio and television broadcasts reporting the various phases of the separate trials. The "Police Scandal" cases took nearly three years to complete. The last such trial

terminated during 1973 in the Circuit Court of Tucker County.

When petitioner was arrested, had a preliminary hearing, and was subsequently indicted during September, 1976, in the Circuit Court of Hancock County, he once again was the subject of newspaper articles reminding the public generally that he was the same man who had never been punished for his previous criminal activities.

Petitioner had requested of his counsel to file a petition for a change of venue before his first trial during April, 1976, but counsel mistakenly believed that a fair trial could be achieved in Hancock County. The jury deliberated less than fifteen (15) minutes before returning a verdict of guilty. When the Circuit Court of Hancock County granted petitioner a new trial and set aside his first conviction because of prosecutorial prejudicial errors committed during closing argument, he thereupon demanded that a change of venue be attempted for him. Counsel at this point readily agreed to make the attempt. A total of 36 witnesses were called by petitioner to impress the Honorable Floyd R. Tarr, Judge, that he could not receive a fair trial in Hancock County. The State called two witnesses, one of whom was a police officer of the City of Weirton, namely, Sargeant John William Curenton, and the other of whom was a Hancock County Magistrate, namely, Norman D. Ferrari, Jr. In addition to the testimony of witnesses petitioner offered several newspaper articles as exhibits in support of the petition for a change of venue. The evidence of the witnesses was overwhelmingly one-sided. These witnesses demonstrated through their sworn testimony that petitioner could not receive

a fair trial in Hancock County. He was characterized variously as a "con man", "drug pusher", "thief", "criminal" and "crook". Nevertheless, the trial court did not agree, denied the motion for a change of venue on September 1, 1977, and rescheduled the second trial to commence on September 7, 1977.

Petitioner, through counsel, had reminded the court that Hancock County was geographically the smallest County in the State of West Virginia and that its population was likewise one of the smallest. Counsel suggested to the court that there were few people indeed who did not remember petitioner's involvement with the "Police Scandal" cases and that there was general ill-will bordering on hatred against him. The trial court apparently felt that even though Hancock County has a population of only approximately forty five thousand (45,000) and even though the City of Weirton has approximately twenty seven thousand (27,000) that a fair and impartial jury could be empaneled.

A second trial resulted in a verdict of guilty in twenty minutes. Accordingly, two separate juries deliberated a total of thirty five minutes in arriving at their finding of guilt.

Thereafter, petitioner filed a petition for writ of error and supersedeas in the Supreme Court of Appeals of West Virginia and the Court denied the petition on June 27, 1978.

REASON FOR GRANTING THE WRIT

I. A Defendant in a State Court Criminal Trial is denied rights afforded by the Sixth and Fourteenth Amendments when the Trial Jurors are aware that the Defendant had been found guilty in a Prior Trial.

The Sixth Amendment to the Constitution of the

United States provides, in part, that in criminal prosecutions, the accused shall enjoy the right to a speedy trial, *by an impartial jury* of the State and district wherein the crime shall have been committed.

At the commencement of the second trial on September 7, 1977, the jurors were selected individually and on voir dire it was clear that some of the jurors were aware, by virtue of newspaper articles, that petitioner had been found guilty in the previous trial, as follows:

> "Q Did those discussions influence you in any way?
> "A No, 'cause just what was in the paper was mostly about a new trial and why, and it said he was convicted and that a new trial, and there must be some question or something if there is a new trial.
>
> Q You are aware that Mr. Marra has had a previous trial?
> A Yes.
>
> Q And, you are aware he was found guilty and was granted a new trial?
> A That was in the paper." (R. 92)[1]

Other members of the panel had read of the prior trial and conviction and since the prospective jurors were not voir dired out of the presence of the other jurors the entire panel knew at the conclusion of the examination. A similar situation occurred in *U.S.* v. *Williams*, 568 F.2d 464 (5th Cir. 1978), where a local television news story reported that the defendant had been convicted earlier of the same charge but that the conviction had been set aside and a new trial awarded. On the third day of the second trial, it was pointed out

[1]References made herein will be to the record as prepared and indexed by the circuit clerk of Hancock County of the trial transcript.

to the court that the television report included a statement that the four defendants had been convicted in a previous trial, but that a new trial had been granted.

The jury had been instructed not to read, view or listen to anything about the trial and when the court polled each juror individually after learning of the newscast, however, five jurors admitted knowing of the report, but only two had actually seen it. Both stated that the story would in no way influence their decision in the case.

Defense counsel moved for a mistrial, but the motion was denied and the court instructed the jury to disregard everything not heard in court. The court noted that there were two broad classes of publicity cases, pretrial publicity and publicity during trial and that when both occurred, the "overlap" result has been termed a "media circus" citing *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) and *Estes* v. *Texas*, 381 U.S. 532 (1965).

Although the court did not base its decision on constitutional principles but on this Court's decisions exercising supervisory powers over the federal courts the court acknowledged that such an occurrence was "inherently prejudicial."[2]

The court noted that one of the fundamental rules of criminal law is that the government had the burden of establishing guilt solely on the basis of evidence produced in the courtroom under circumstances assuring the defendant the attendant judicial safeguards and turned to the question of the damage which results:

[2]*Murphy* v. *Florida*, 421 U.S. 794 (1945) and *Marshall* v. *U.S.*, 360 U.S. 310 (19[illegible]), held that persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced.

> "The question, then, is whether information about a defendant's conviction in a former trial is as damaging as information about a defendant's prior criminal acts. *We conclude that it is perhaps even more damaging.* . . . In the instant case, the news story told the jurors that another jury had found the defendants guilty on the same, identical charges but that a new trial had been granted . . ." (Emphasis supplied).

As to the admonition given the jurors and the two jurors who stated they could disregard the newscast, the court responded:

> "The fact that the two jurors said they could disregard the newscast and decide the case solely on the evidence adduced in the court is not controlling . . . The effect of exposure to extrajudicial reports on a juror's deliberations may be substantial even though it is not perceived by the juror himself, and a juror's good faith cannot counter this effect . . . We think that is the case here, i.e., that the juror's statements are insufficient to obviate the problems of fairness caused by the news report.
>
> Nor are we convinced that the prejudice was corrected by the court's standard adminition to disregard everything not heard in court . . ."

The petitioner finds himself in the unenviable position that while this Court has not yet chosen to extend those rights he would receive in a federal prosecution to a state court proceeding, by virtue of the West Virginia appellate procedure he will be remediless.

II. The Decision Below Denied Petitioner an Appeal as a Matter of Right and Thus Denied Protection of the Fourteenth Amendment of the United States Constitution.

No appeal as a matter of right exists in the State of West Virginia. Every state with the exception of West Virginia and Virginia provides for an appeal to either an intermediate appellate court or to the highest appellate court in the state as a right.

In West Virginia, statutory procedures require an application for appeal by means of an *ex parte* petition for a writ of error. The Supreme Court of Appeals, in its discretion, then determines whether there should be a full review of the case with presentation and arguments by both parties in the event the appeal is granted. A denial of the petition for writ of error is executed by entry of a brief order reciting such denial. Thus, no opinion, memorandum or other comment is available to an unsuccessful appellant-petitioner for possible future clarification in a petition for rehearing. A review of appellate procedures in other states reveals that those citizens, via state constitutions or statutory provisions, are entitled to a full appellate review upon briefs and arguments of counsel for both parties, as a matter of right.[3]

Chapter 58, Article 5, *et seq.*, West Virginia Code, 1931, as amended, are the applicable statutory sections dealing with appellate relief in the Supreme Court of Appeals of

[3]West Virginia and Virginia are the only two states which presently require *applications* for appellate review as opposed to an appeal as a matter of right. The State Codes and Constitutions of these two states are very similar due to the fact that West Virginia, upon entry to the Union in 1863, was formerly a part of the State of Virginia and adopted various constitutional provisions, statutes and procedures from the existing body of Virginia law. See also, Judicature, "Is the Right of Appeal Protected By the Fourteenth Amendment?," Vol. 54, No. 7, February, 1971.

West Virginia. West Virginia Code 58-5-1, 1931, as amended, in pertinent part, provides:

> "A party to a controversy in any circuit court may obtain from the supreme court of appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases: (a) In civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars, wherein there is a final judgment, decree or order;"
>
> * * * *

There are no intermediate appellate courts in West Virginia and an application for appeal from a circuit court judgment must be taken according to the procedures set forth in West Virginia Code, 58-5 *et seq.*[4]

In addition, West Virginia Code, 58-5-3, provides:

> "Any person who is a party to such controversy, wishing to obtain a writ of error, appeal or supersedeas in the cases named in the first section [§58-5-1] of this article, may present a petition therefor to the supreme court of appeals, or to a judge thereof in vacation, which petition shall assign errors.

West Virginia Code, 58-5-4, specifies that an application for appeal must be filed within eight months after the entry of the judgment order in the circuit court. This time limit is mandatory and jurisdictional and a failure to comply is fatal. *State* v. *Legg*, 151 W. Va. 401, 151 S. E. 2d 215 (1966).[5]

[4]Civil and Criminal appellate procedure is basically the same in West Virginia. An appeal of a conviction must also begin with an application for appeal by petition for a writ of error and supersedeas.

[5]This has been the general rule in West Virginia since 1885 when the West Virginia Supreme Court so held in the case of *Lloyd* v. *Kyle*, 26 W. Va. 534 (1885). See also, *Sothen* v. *Continental Assurance Co.*, 147 W. Va. 458, 128 S. E. 2d 458 (1962); *State ex rel Davis* v. *Boles*, 151 W. Va. 221, 151 S. E. 2d 110 (1966).

To a degree, West Virginia appellate relief can be compared with relief in this Court in that no appeal lies as a right. A case presented in this Court, either on appeal or certiorari, can be denied without opinion or further argument.[6] It is apparent that such a procedure at the state level, where the first avenues of appellate relief should be clear and unrestricted, is manifestly unjust. The method presently in operation in West Virginia denies an aggrieved appellant the proper review and consideration contemplated by the dictates of fundamental fairness, due process and equal protection.

Although no statutory provision expressly states that there is no right to an appeal in West Virginia, the West Virginia Supreme Court of appeals has consistently held that the provisions of Chapter 58, Article 5, *et seq.*, do not provide an appeal as a matter of right even in criminal cases.[7] In *State* v. *Legg*, 151 W. Va. 401, 151 S. E. 2d 215 (1966), a criminal appeal, the West Virginia Supreme Court of appeals held:

> "One convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error . . . There is no absolute right in a suitor to have a decision against him reviewed . . ."

It is apparent from the foregoing that an appellant in West Virginia is not afforded the same rights and

[6]Unlike West Virginia, however, there is a review as a matter of right to the Circuit Courts of Appeals in the federal system which provides an effective review. With variations, this is the appellate procedure adopted in all but two of the States.

[7]West Virginia Code, 58-5-10, 1931, as amended, provides: "The court or judge to whom a petition is duly presented, if of the opinion that the decision complained of ought to be reviewed, may allow an appeal . . ." Certainly implicit in this provision is the discretionary nature of the granting of an appeal; however, no provision in the Code expressly denies the right to appeal. The statutory procedure and cases interpreting that procedure speak for themselves.

privileges as appellants in other states. The petitioner herein was effectively denied a full appellate review without reason or explanation. There were valid assertions of constitutional as well as other errors at the trial court level raised by petitioner in his application for appeal below and such claims of error should not be cast aside summarily without full review and hearing.[8]

Petitioner has been denied his constitutionally protected right to due process of the law and has been denied equal protection of the laws. Petitioner is penalized for residing in one of the only two jurisdictions in the country which do not make the appellate review procedure available as a right. The Fourteenth Amendment to the United States Constitution can clearly be viewed as protecting the right to appeal for all citizens of the United States.

Appellate review and the right to be heard upon appeal without unreasoned restrictions have been the subject of many cases in this Court. *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966), was a criminal appeal involving a prisoner's right to a transcript upon appeal. Rinaldi was proceeding in *forma pauperis* and could not afford the transcript required by New Jersey statutes. In reversing, this Court, per Justice Stewart, held:

> "This Court has never held that the States are required to establish avenues of appellate review, but *it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the Courts . . .*" (Emphasis Supplied).[9]

[8]Although Rules of Practice in the Supreme Court of Appeals of West Virginia allow a maximum 10 minutes oral presentation of the application for appeal, for all practical purposes there is not sufficient time to argue the various legal issues raised upon the application and the merits of the case are rarely gone into at depth. The only meaningful treatment of legal questions is in appellant's brief.

Another case dealing with the furnishing of a transcript is *Mayer* v. *City of Chicago*, 404 U.S. 189, (1971), wherein, at page 193 of the United States Report, this Court readopted the rule in *Rinaldi* saying:

> ". . . avenues of appellate review must be kept free of unreasoned distinctions that can only impede open and equal access to the courts . . . Therefore, in all cases the duty of the State is to provide the indigent as adequate and effective with funds . . ."

In West Virginia not only indigents but *every* aggrieved party seeking an appeal are shackled by the same unreasoned distinctions and restrictions.

The case of *Williams v. Oklahoma City*, 395 U. S. 458, (1969), similarly upheld the appellant's right to a transcript. The view as set forth in *Rinaldi v. Yeager*, 384 U. S. 305, *supra*, was followed and this Court also noted:

> "Although the Oklahoma statutes expressly provide that 'an appeal to the Court of Criminal Appeals may be taken by the defendant as a matter of right . . .' the decision of the Court of Criminal Appeals wholly denies any right of appeal to this impoverished petitioner . . . This is an 'unreasoned distinction' which the Fourteenth Amendment forbids the State to make . . ."

The instant case would perhaps be different if West Virginia was only one of many states which deny a

[9]There have been many "right to transcript" cases ruled upon both in this Court and in the various federal and state appellate courts. These cases are cited primarily to amplify the logic which underlies all decisions which afford appellate tools to ingredients and others, i.e., the sanctity of the appeal itself.

civil or criminal appeal as a matter of right. However, the language used by this Court in the foregoing cases indicates the gravity and importance of an unrestricted appellate process. Indeed, the Constitution intended to protect civil property rights as well as life and liberty. As noted in the Judicature article above[10] the Model Judicial Article proposed by the American Bar Association recommends that a defendant shall have an absolute right to one appeal in all criminal cases. Without a doubt due process and equal protection guarantees protect civil litigants as well as criminal. See *Bodie v. Connecticut,* 401 U.S. 371, (1971).

Petitioners are thus asserting a right afforded the vast majority of citizens in this country. Whether a new and more approachable appellate system in West Virginia should result from this case is for this Court to decide upon the basis of its determination of the federally protected constitutional rights claimed herein. The system in West Virginia as it now stands violates fundamental fairness and equal protection in that the majority of appellants in this state possess rights without remedies.[11] Petitioners have no remedy at this time save the relief sought in this Court; had petitioners resided in any other state their appeal would have been properly heard long ago.

[10]See foot note 3, *ante.*
[11]See 87 A.B.A. Rep. 391-399 (1962).

CONCLUSION

For the foregoing reasons it is respectfully submitted that a writ of certiorari should issue to review the order of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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APPENDIX

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of June, 1978, the following order was made and entered, to-wit:

STATE OF WEST VIRGINIA

vs.

SAL MARRA

On a former day, to-wit, May 22, 1978, came the petitioner, Sal Marra, by Leonard Z. Alpert, his attorney, and presented to the Court his petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Hancock County rendered in this case on the 26th day of September, 1977, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected the writ of error and supersedeas prayed for is refused by a majority of the Court. Justice Miller would grant.

A True Copy

Attest: .....

Clerk Supreme Court of Appeals

West Virginia Code, Ch. 58, Art. 5, sec. 1

§58-5-1. When appeal or writ or error lies.

A party to a controversy in any circuit court may obtain from the supreme court of appeals, or a judge thereof in vacation, an appeal from, or a writ of error or supersedeas to, a judgment, decree or order of such circuit court in the following cases: (a) In civil cases where the matter in controversy, exclusive of costs, is of greater value or

amount than one hundred dollars, wherein there is a final judgment, decree or order;

(b) In controversies concerning the title or boundaries of land, the probate of a will, or the appointment of a personal representative, guardian, committee or curator;

(c) Concerning a mill, road, way, ferry or landing;

(d) Concerning the right of a corporation, county or district to levy tolls or taxes;

(e) In any case of quo warranto, habeas corpus, mandamus or prohibition;

(f) In any case involving freedom or the constitutionality of a law;

(g) In any case in chancery wherein there is a decree or order dissolving or refusing to dissolve an injunction, or requiring money to be paid, or real estate to be sold, or the possession or title of property to be changed, or adjudicating the principles of the cause;

(h) In any case where there is a judgment or order quashing or abating, or refusing to quash or abate, an attachment;

(i) In any civil case where there is an order granting a new trial or rehearing, and in such cases an appeal may be taken from the order without waiting for the new trial or rehearing to be had;

(j) In any criminal case where there has been a conviction in a circuit court or a conviction in an inferior court which has been affirmed in a circuit court.

Appeals shall not lie under subdivisions (g), (h) and (i) where pecuniary interests only are involved, unless

the amount in controversy, exclusive of costs, exceeds one hundred dollars.

West Virginia Code, Ch. 58, Art. 5, sec. 3

§58-5-3 Presentation of petition assigning errors.

Any person who is a party to such controversy, wishing to obtain a writ of error, appeal or supersedeas in the cases named in the first section [§ 58-5-1] of this article, may present a petition therefor to the supreme court of appeals, or to a judge thereof in vacation, which petition shall assign errors.

West Virginia Code, Ch. 58, Art. 5, sec. 4

§58-5-4. Time for appeal or writ of error; notice of intent to file petition in criminal cases to be filed with clerk stating grounds.

No petition shall be presented for an appeal from, or writ of error or supersedeas to, any judgment, decree or order, whether the State be a party thereto or not, which shall have been rendered or made more than eight months before such petition is presented.

In criminal cases no petition for appeal or writ of error shall be presented unless a notice of intent to file such petition shall have been filed with the clerk of the court in which the judgment or order was entered within sixty days after such judgment or order was entered. The notice shall fairly state the grounds for the petition without restricting the right to assign additional grounds in the petition. (Code 1849, c. 182, § 3;)

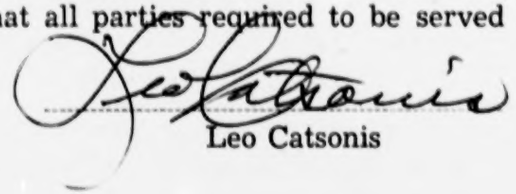
West Virginia Code, Ch. 58, Art. 5, sec. 10

§58-5-10. Allowance of appeal or writ of error or supersedeas; stay of proceedings.

The court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or supersedeas, and may stay proceedings either in whole or in part.

CERTIFICATE OF SERVICE

I, Leo Catsonis, one of counsel for the petitioner and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 22nd day of September, 1978, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the respondent by depositing same in a United States mailbox, with postage prepaid, addressed to counsel of record for the respondents, Robert G. Altomare, Prosecuting Attorney, Hancock County Court House, New Cumberland, West Virginia 26047. I further certify that all parties required to be served have been served.



Leo Catsonis